Supreme Court, U.S.
FILED
OCT 8 - 2014
OFFICE OF THE CLERK

No. 14-275

In the Supreme Court of the United States

MARVIN D. HORNE, ET AL., PETITIONERS

v.

UNITED STATES DEPARTMENT OF AGRICULTURE, RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE CATO INSTITUTE, NATIONAL FEDERATION OF INDEPENDENT BUSINESS, CENTER FOR CONSTITUTIONAL JURISPRUDENCE, INSTITUTE FOR JUSTICE, REASON FOUNDATION, AND SOUTHEASTERN LEGAL FOUNDATION AS *AMICI CURIAE* IN SUPPORT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the government's "categorical duty" under the Fifth Amendment to pay just compensation when it "physically takes possession of an interest in property," *Arkansas Game & Fish Comm'n* v. *United States*, 133 S. Ct. 511, 518 (2012), applies only to real property and not to personal property.

2. Whether the government may avoid the categorical duty to pay just compensation for a physical taking of property by reserving to the property owner a contingent interest in a portion of the value of the property, set at the government's discretion.

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INTRODUCTION AND INTEREST OF *AMICI CURIAE*

Amici are advocates for individual freedom who regard the right to keep and control one's own property as among the most vital rights in any free society and the most basic rights protected by the Constitution. See Appendix A. Four of the *amici* participated in this case in its previous iteration, when this Court unanimously rebuffed the government's attempt to make property owners sue twice—once in federal district court and once in the Court of Claims—to vindicate their property rights.

The case is here again, this time because the Ninth Circuit has wrought a major upheaval of basic principles of takings law. The seeds of this case were sown in 1949, when the Department of Agriculture established a Raisin Marketing Order, ostensibly to smooth market fluctuations. The government's scheme conscripts raisin "handlers" to convey title to a quota of "producers'" raisins to its Raisin Administrative Committee. This Committee then has unbridled discretion over the fate of its spoils. It can sell the raisins for profit, ship them to another public agency, or even give them to foreign countries.

Meanwhile, the handler must "hold in storage" the raisins "for the account of the committee" "until he has been relieved of such responsibility." 7 C.F.R. §§ 989.66-67. Once the Committee disposes of the

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* Pursuant to Rule 37.2(a), *amici* provided timely notice of their intention to file this brief. All parties have consented. In accordance with Rule 37.6, no counsel for any party has authored this brief in whole or in part, and no person or entity other than the *amici* has made a monetary contribution to the preparation or submission of this brief.

raisins, hands out export subsidies to its preferred processors, and covers its administrative costs, it might have funds remaining to disburse to the farmers whose raisins were taken and who retained a contingent interest in those proceeds.

Or it might not. In 2003-2004, petitioners, the Hornes, turned over 306 tons of raisins—30% of their crop—to USDA; in return, they received *nothing*. Pet. App. 41a. The year before, when they turned over nearly half of their raisins, they received far less than their cost of production. Pet. 6-7. Thus, a New Deal program whose raison d'être was to lift prices above "the cost of production" (Pet. App. 4a) now forces raisin farmers to fork over the fruits of their labor with no hope of even covering their expenses. Year in and year out, the Committee takes farmers' crops without providing just—or sometimes any—compensation.

The Ninth Circuit nevertheless upheld the government's scheme, on two grounds. First, the court departed from this Court's precedent and squarely split with six other circuits by drawing an artificial distinction between real and personal property. Under the per se rule of *Loretto* v. *Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982), any physical confiscation of property has always required just compensation. But according to the Ninth Circuit, the mere fact that the property here is "personal," not "real," immunizes the taking from *Loretto*'s reach.

The Takings Clause, however, makes no distinction between "real" and "personal" property—it states categorically that "private property" shall not "be taken for public use, without just compensation." U.S. Const. amend. V. Nor did *Loretto* rest on any

such distinction. It held that, where the government "effectively destroys *each*" of one's "[p]roperty rights in a physical thing"—"the rights 'to possess, use and dispose of'" the property—this Court's "cases uniformly have found a taking." 458 U.S. at 435, 434.

But the Ninth Circuit's distinction not only conflicts with the constitutional text and this Court's precedents. It also lacks any economic basis and favors landowners over those who lack the means to buy real estate. The Hornes lost all right to possess, use, and dispose of their own property. It is constitutionally irrelevant that the property is a ton of raisins grown on their farm, rather than the farm itself.

Second, the decision below authorizes the government to flout its constitutional obligation to provide just compensation merely by providing a future, contingent interest that may well prove worthless. By the Ninth Circuit's lights, *Loretto*'s per se rule is inapplicable whenever the government's scheme preserves the theoretical possibility of a payout from the government's use of the taken property—even if, as here, the payout never materializes or it amounts to less than the owners' cost of producing the property in the first place. The court justified this result on the ground that the property owners share in the public benefits supposedly produced by the taking, effectively reducing the Takings Clause to a form of rational-basis-style "legitimate purpose" review.

By permitting the government to avoid *Loretto*'s per se rule merely by offering a contingent interest that could be utterly worthless, the Ninth Circuit opened the door to procedural gamesmanship that threatens to send property rights the way of the California Raisins. The court found it persuasive that the

government scheme was "carefully crafted to ensure the [owners] are not completely divested of their property rights" in the sense that they retain the right to an "equitable distribution," albeit one that "may be zero." Pet. App. 18a, 21a. But this mistakes the problem for the solution. *Any* government action can be joined with some trivial, contingent right. Surely the government may not seize our cars to deliver the mail and avoid paying just compensation by allowing us to use them on Sundays.

Nor, obviously, is the fact that mail would be delivered to our homes Monday through Saturday—our bit of the public benefit—sufficient to avoid a per se taking. Yet that is exactly what the Ninth Circuit held in ruling that the Hornes' enjoyment of the supposed benefits of collectivization is a "contingent interest" sufficient to avoid *Loretto*.

By devaluing property rights of all sorts, the Ninth Circuit's approach weakens the values of autonomy and reliance that undergird the Takings Clause and our constitutional order. James Madison could have been speaking directly to the court below when he admonished: "Government is instituted to protect property *of every sort*," and "the end of government * * * is a *just* government, which *impartially* secures to every man, whatever is his *own*." James Madison, *Property*, Nat'l Gazette, Mar. 29, 1792, reprinted in 14 The Papers of James Madison 266 (Robert A. Rutland et al. eds., 1983) (first emphasis added).

The Ninth Circuit's decision radically shrivels the right to own property—in a manner that conflicts with the precedents of this Court and numerous cir-

cuits, the nation's founding ideals, and the Constitution. Certiorari should be granted.

STATEMENT

1. Much-criticized relics of the New Deal, agricultural marketing orders administered by the United States Department of Agriculture (USDA) continue to tightly control the supply of many agricultural products today. In theory, these orders are designed to prevent "unreasonable fluctuations in supplies and prices." 7 U.S.C. § 602(4). In reality, the orders create government-enforced cartels that give bureaucrats carte blanche both to fine farmers who sell more than their allotted quotas and to drive up prices for consumers. See generally Thomas M. Lenard & Michael P. Mazur, *Harvest of Waste: The Marketing Order Program*, Regulation, May/June 1985.[1]

2. This case involves the USDA's marketing order for raisins, which "effects a direct transfer of title of a producer's 'reserve tonnage' raisins to the government." *Evans* v. *United States*, 74 Fed. Cl. 554, 558 (2006). Under that order, handlers of raisins must reserve a certain portion of the producers' crop, which they may not sell on the open market. USDA annually establishes the amount to be reserved, based on the recommendations of a committee of 46 industry representatives and *one* representative of the public. 7 C.F.R. §§ 989.26, 989.29-30, 989.35-36.

The reserve-tonnage raisins must be physically segregated from the rest of the farmer's crop and held "for the account" of the Committee, which takes title. *Id.* §§ 989.65, 989.66(a), (b)(1), (b)(2), (g). After the Committee disposes of the raisins and covers its ex-

[1] Available at www.cato.org/pubs/regulation/regv9n3/v9n3-4.pdf.

penses, "[w]hatever net income remains [if any] is disbursed to" the farmers who grew the raisins and were forced to turn them over. Pet. App. 6a (citing 7 C.F.R. § 989.66(h)).

The Committee's central planning has been less than stellar. After "allegations that members of the Raisin Administrative Committee engaged in illegal price-fixing and market division discussions with foreign producers," the USDA amended the marketing order to prohibit such conduct. Daniel Bensing, *The Promulgation and Implementation of Federal Marketing Orders Regulating Fruit and Vegetable Crops Under the Agricultural Marketing Agreement Act of 1937*, 5 San Joaquin Agric. L. Rev. 3, 20 (1995). The Committee does consumers no favors either: its creation of "artificial raisin-scarcity * * * drives up prices," with the paradoxical result "that Californian raisins are sometimes cheaper abroad than they are in California." *Why does America regulate the trade in raisins?*, The Economist (Apr. 14, 2013).[2]

3. The Hornes are farmers in Fresno and Madera Counties. During the relevant years, 2002-2003 and 2003-2004, the Hornes did not set aside the mandated reserve-tonnage raisins. As they explained to the Committee, they believed they had a "right[] under the Constitution" not to "relinquish ownership of [their] crop" to the government. Pet. App. 129a-130a. The government disagreed. It initiated an administrative enforcement action against the Hornes, and the USDA ultimately found them liable for failing to give up their raisins. Pet. App. 8a.

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[2] Available at http://econ.st/1C60qXK.

4. The Hornes sought relief in federal court. Pet. App. 8a. After the district court granted summary judgment to the USDA, the Hornes appealed to the Ninth Circuit, which initially held that no taking had occurred because the marketing order "applies to the Hornes only insofar as they voluntarily choose to send their raisins into the stream of interstate commerce." Pet. App. 208a. But when the Hornes sought rehearing, the Ninth Circuit changed its tune, deciding it lacked jurisdiction over the takings issue.

This Court unanimously reversed. Pet. App. 258a. As the Court held, "it is clear that the Government has both taken property *and* denied just compensation," which permits the Hornes to bring a Fifth Amendment claim. Pet. App. 254a (emphasis added). The Court remanded the case so that, as Justice Kagan put it, the Ninth Circuit could "figure out whether this marketing order is a taking or * * * just the world's most outdated law." Transcript of Oral Argument 49, *Horne* v. *Dep't of Agric.*, 133 S. Ct. 2053 (2013) (No. 12-123).

5. On remand, the same panel again ruled that the Committee's seizure of the raisins is not a compensable taking. The court cited two reasons—neither of them advanced by the government—why the per se rule requiring compensation for physical confiscations of property does not apply.

First, "the Marketing Order operates on personal, rather than real property," and "the Takings Clause affords less protection to personal than to real property." Pet. App. 18a. Second, the Hornes retain a "contingent interest" in the proceeds from their raisins, so they "are not completely divested of their property rights." *Ibid.*

The panel acknowledged that "the equitable distribution" from the Committee "may be zero," but it "is not zero in every year" (Pet. App. 21a)—at least, not for those who participate year after year. Even when it is, that is only because "it just so happens that in those years" the Committee's "gross proceeds are not greater than [its] operating expenses." *Ibid.* In any event, the taken raisins "continue to work to the Hornes' benefit" because USDA uses them "to stabilize market conditions." Pet. App. 21a-22a.

REASONS FOR GRANTING THE WRIT

I. In conflict with decisions of this Court and other circuits, the Ninth Circuit wrongly limited *Loretto* to real property.

Where the government effects "a permanent physical occupation of property," this Court's "cases uniformly have found a taking." *Loretto*, 458 U.S. at 434. Here, the government "effectively destroy[ed] *each*" of the Hornes' "[p]roperty rights in a physical thing"—"the rights 'to possess, use and dispose of" their raisins. *Id.* at 435. But in conflict with the decisions of this Court and other circuits, the Ninth Circuit held that *Loretto* does not govern "controversies involving personal property." Pet. App. 20a. Review is needed.

A. The Ninth Circuit relied on inapposite dicta and contradicted this Court's explicit recognition that *Loretto* applies to personal property.

1. This Court has never held that *Loretto*'s per se rule is limited to real property. *Loretto* itself certainly states no such rule: As the Ninth Circuit admitted, "the *Loretto* Court did not have occasion to consider the occupation of personal property." Pet. App. 20a. In fact, "the actual holding of *Loretto* makes no men-

tion of a distinction between real and personal property, nor was any rationale given in the opinion that might justify such a distinction." *Nixon* v. *United States*, 978 F.2d 1269, 1284 (D.C. Cir. 1992).

To support its distinction between real and personal property, the Ninth Circuit thus relied instead on a "later discussion of personal property in *Lucas*," where this Court observed in dictum that, "'in the case of personal property,'" the government has a "'traditionally high degree of control.'" Pet. App. 18a-20a (quoting *Lucas* v. *S.C. Coastal Council*, 505 U.S. 1003, 1027-1028 (1992)). This passage, the court reasoned, shows that there is "no reason to extend *Loretto* to govern controversies involving personal property." Pet. App. 20a. The court below was mistaken.

First, *Lucas* did *not* involve a "physical invasion" of property (505 U.S. at 1015)—the type of taking at issue here and in *Loretto*. USDA wishes to physically take possession of the Hornes' raisins. *Lucas*, by contrast, dealt with the distinct situation "where regulation denies all economically beneficial or productive use of land." *Ibid.* The Marketing Order does not merely diminish the value of the Hornes' property, or foreclose certain uses thereof. Rather, the government has *outright taken title* to that property for a public use while refusing to pay for it.

Put simply, regulatory-taking rules are irrelevant. The panel's treatment of a "regulatory taking" case like *Lucas* as "controlling" in a "case[] involving physical takings" ignored a "longstanding distinction" between the two and was "inappropriate." *Tahoe-Sierra Preservation Council* v. *Tahoe Reg'l Planning Agency*, 535 U.S. 302, 323-324 (2002) (internal quotation marks omitted); Pet. 25-26.

Second, this Court has already recognized that *Loretto does* apply to personal property. A decade after *Lucas*, the Court analyzed the government's forced "transfer of the interest" in lawyers' trust accounts—*personal* property—under the "*per se* approach," finding that it was "akin to the occupation" of property "in *Loretto*." *Brown* v. *Legal Found. of Wash.*, 538 U.S. 216, 235 (2003) (citing *Phillips* v. *Wash. Legal Found.*, 524 U.S. 156, 172 (1998)).

By ignoring and contradicting *Brown*, the Ninth Circuit parted company with six other circuits (see *infra* at 11-12) and rendered a highly destabilizing decision. If intangible and fungible property like earned interest on a trust fund is subject to *Loretto*'s categorical rule, then surely "physical thing[s]" like raisins—which can literally be "possess[ed], use[d] and dispose[d] of"—fall under its protection. *Loretto*, 458 U.S. at 435 (internal quotation marks omitted). Indeed, such "physical appropriations * * * represent a *greater* affront to individual property rights." *Tahoe-Sierra*, 535 U.S. at 324 (emphasis added).

2. Remarkably, not only did the Ninth Circuit ignore *this* Court's logic in *Brown*, it quoted its *own* contrary reasoning from the same case: "'[t]he per se analysis has not typically been employed outside the context of real property.'" Pet. App. 20a (quoting *Wash. Legal Found.* v. *Legal Found. of Wash.*, 271 F.3d 835, 854 (9th Cir. 2001) ("*WLF*") (en banc), *aff'd sub nom.*, *Brown*, 538 U.S. 216). The panel neglected that, although this Court affirmed the *judgment* in *Brown*, it *rejected* the Ninth Circuit's takings analysis. This Court "agree[d]" with "the *dissenters*," who "likened" the government's confiscation of earned interest "to the kind of '*per se*' taking that occurred in *Loretto*." *Brown*, 538 U.S. at 235 (emphasis added).

As those dissenters recognized, the "argu[ment] that the per se approach of *Loretto* and similar cases applies primarily to takings of real property * * * is not true." 271 F.3d at 866 (Kozinski, J., dissenting). After all, "if the city wants to display your Renoir in its museum, it can't just take it and compensate you with the joy of viewing it during visiting hours." *Ibid.* For raisin farmers in California, the deal is even worse. If the Ninth Circuit is right, the government can take your Renoir, send it back to France, and, after pocketing the change to cover its own budget, give you absolutely nothing.

That dangerous reasoning is an affront to this Court's precedent, to the decisions of six other circuits, and to the ideals of private property on which the nation was founded. Review is warranted.

B. Review is needed to resolve the circuit split on this recurring issue—a split that includes the Federal Circuit, which hears more takings cases than any other circuit.

As petitioners show (Pet. 18-19), the Ninth Circuit's erroneous holding that government confiscation of personal property is never subject to *Loretto*'s per se rule split with the Fifth, Sixth, Seventh, Tenth, and D.C. Circuits. Pet. 18-19.[3] Critically, however,

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[3] See *Nixon*, 978 F.2d at 1284 (rejecting the "argu[ment] that the per se takings doctrine applies only to * * * real property" as "fail[ing] for want of authority or logic"); *Warner/Elektra/Atl. Corp.* v. *Cnty. of DuPage*, 991 F.2d 1280, 1285 (7th Cir. 1993) ("American governments" "have to pay just compensation" when they "requisition personal property"); *Anderson* v. *Spear*, 356 F.3d 651, 668-669 (6th Cir. 2004) (state's "disgorgement" of campaign funds "constitutes a *per se* taking"); *Porter* v. *United States*, 473 F.2d 1329, 1333 (5th Cir. 1973) (per se test applied to "commonplace items of personal property"); *United States* v.

that holding also split with the Federal Circuit, which has exclusive jurisdiction over appeals from the Court of Claims and "hears more takings cases than any other federal court." Tedra Fox, *Lake Tahoe's Temporary Development Moratorium*, 28 Ecology L.Q. 399, 426 (2001).

The Federal Circuit has "rejected the * * * contention that a 'per se' takings analysis is never applicable when personal property is at issue." *Rose Acre Farms, Inc.* v. *United States*, 373 F.3d 1177, 1196 & n.17 (Fed. Cir. 2004). As that court has recognized, government confiscation of personal property is "akin to the 'per se' taking that occurred in *Loretto*." *Id.* at 1196 n.17 (citing *Brown*, 538 U.S. at 235).

The Ninth Circuit held the exact opposite, yet failed even to mention, much less distinguish, any of these contrary authorities. And while other circuits have recognized the proper scope of the Takings Clause, that is cold comfort to farmers in the Ninth Circuit—by far the nation's largest jurisdiction—who will remain at the mercy of government cartels. This Court alone can protect them.

C. There is no principled distinction between government confiscation of real and personal property.

It is no wonder that—unlike the Ninth Circuit—most courts have decided that the Takings Clause applies to confiscations of land and personal property alike. Economically, distinguishing between real and personal property makes no sense. Regardless of the property's uniqueness or "sentimental value," only

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Corbin, 423 F.2d 821, 826 (10th Cir. 1970) (per se test applied where "the Government took possession of * * * fish").

the "market value" of taken property is compensable. *WLF*, 271 F.3d at 866 (Kozinski, J., dissenting). "For purposes of the Takings Clause," therefore, both "real and personal property are reduced to their cash equivalents." *Ibid.*

That value, moreover, is measured exactly the same way for real property as it is for personal property. "[T]en acres of undeveloped land in rural Maine is not as valuable as ten acres of undeveloped land in midtown Manhattan," because "people are willing to pay a higher price for access to Manhattan." *Philip Morris, Inc.* v. *Reilly*, 312 F.3d 24, 51 (1st Cir. 2002) (Selya, J., concurring). If land itself had some special significance, "these tracts of equal size and topographical characteristics [w]ould be worth the same." *Ibid.* But no one pretends that they are, or that land is any less commercialized or fungible than any other property. "Limiting per se takings analysis to cases involving real property is" thus "a crude boundary with no compelling basis" in economics or "the law." *Ibid.*

Unfortunately, the Ninth Circuit's unprecedented view of the Takings Clause "will doubtless be greeted with a rousing cheer by government officials who will eagerly" seize personal property—including "bank accounts and other places where money is kept"—all while easily "justifying it with some sort of 'ad hoc' analysis." *WLF*, 271 F.3d at 866 (Kozinski, J., dissenting). Review is urgently needed.

II. The Ninth Circuit's approach would encourage the government to engage in procedural gamesmanship to avoid *Loretto*'s per se takings rule.

Apart from its artificial distinction between real and personal property, the Ninth Circuit refused to apply *Loretto* because "the Hornes retain the right to the proceeds from" the Committee's disposition of the raisins, so their "rights with respect to the reserved raisins are not extinguished." Pet. App. 21a. True, "the equitable distribution may be zero," but that is only because "it just so happens that in those years" the Committee has no net revenue. *Ibid.* Thus, the Ninth Circuit held, "the Hornes did not lose all economically valuable use of" their raisins, and *Loretto* does not apply. Pet. App. 20a. Instead, because the Hornes retained some "residual value after the regulation's application," the court applied "the ad hoc framework" of *Penn Central Transportation Co.* v. *City of New York*, 438 U.S. 104 (1978). Pet. App. 22a n.17, 16a.

Permitting the decision below to stand would have negative consequences for all types of property rights. The Ninth Circuit's rationale extends to confiscations of both personal and real property. It would allow the government to avoid *Loretto* simply by giving inadequate—or purely theoretical—compensation to those whose property is taken. Just as problematic, the decision below counts the claimed benefits that purportedly flow from the government's use of the taken property as an adequate contingent interest. That cannot be the law. If it were, it would undermine core property rights and lead to the vast majority of takings being analyzed only under *Penn Central*'s highly deferential balancing test.

A. Under the Ninth Circuit's rule, the government could manipulate the standard of review by offering an illusory contingent interest.

According to the Ninth Circuit, the government may avoid paying just compensation simply by giving property owners some contingent interest in their taken property. Under its decision, the per se takings rule would collapse; it would apply only when a particularly uncreative government body forgets to provide the property owner a meaningless remainder interest. After all, every regulation could easily be, in the Ninth Circuit's words, "carefully crafted to ensure the [property owners] are not completely divested of their property rights"—especially if it is quite alright that "the equitable distribution" from the interest "may be zero." Pet. App. 18a, 21a.

The dangers of this Kafkaesque rule extend to all types of property. The Ninth Circuit considered its imaginary contingent interest rationale for avoiding *Loretto* "independent" from its mistaken distinction between real and personal property. Pet. App. 17a. Thus, a government seeking to build a new highway through private property might avoid the per se rule by leaving the property owners a contingent interest in highway funds—just as the Post Office, desiring to seize vehicles for mail delivery, might avoid that rule by leaving the vehicles' owners a contingent interest in mail-related revenues. And since the government can decide the scope of the contingent interest, there is every reason to expect that the interest will, as the Ninth Circuit says, "just so happen[]" to be worthless. Pet. App. 21a.

Were the Ninth Circuit's destructive rule correct, this Court's past takings cases should have come out the other way. The seizure of coal mines in *United States* v. *Pewee Coal Co.* would not have required the government "to pay just compensation," had it simply reserved to the mine's former owner a theoretical interest in the mine's production. 341 U.S. 114, 117 (1951) (plurality). And the disruptive flights directly over a home and farm in *United States* v. *Causby* could have been "balanced" into a non-compensable taking if only the government had offered a token portion of airport net revenues to the homeowner. 328 U.S. 256, 265 (1946). In short, the Ninth Circuit's approach would, apart from the rarest example of a government forgetting to reserve a parchment interest, eviscerate the per se takings rules.

B. The Ninth Circuit's decision permits the government to avoid the per se rule merely by characterizing diffuse public benefits as "contingent interests."

Permitting governments to manipulate the standard of review by leaving the property owner a meaningless contingent interest is bad enough. But the Ninth Circuit went further. By its lights, *Loretto*'s per se rule does not apply because "even in years in which producers receive no equitable distribution," the Hornes' interest "funds the administration of an industry committee" that allegedly "ensures the reserved raisins continue to work to the Hornes' benefit after they are diverted to the" Committee. Pet. App. 21a-22a. The Committee uses the funds from the Hornes' property to "represent[] raisin producers" and supposedly "stabilize the field price of raisins." Pet.

App. 21a.[4] In other words, because the government knows how to use raisins better than the Hornes do (if only they understood!), the Hornes have a continuing contingent interest sufficient to avoid the per se rule. Once again, this collectivist view of property is foreign to the Fifth Amendment.

It is no exaggeration to say that, if this view became law, the following scheme would be judged, not under *Loretto*, but only under *Penn Central*'s far weaker balancing test: The government forms a Land Administrative Committee, which has the power to take 50 percent of all real property and direct its use. The (former) property owners must keep the land "for the account" of the Committee. The owners receive no compensation. Instead, the government puts the land to a "better" use and provides, say, lower taxes, or some other diffuse public benefit to the owners (accepted as true in court on the government's say-so). Under the Ninth Circuit's view, this is not a per se taking.

That cannot be right. As the Hornes put it, farmers may not lawfully be required to "relinquish ownership of [their] crop"—they "put forth the money and effort to grow it, not the Raisin Administrative Committee. This is America, not a communist state." April 23, 2002 Letter from the Hornes to the Secretary of Agriculture and the Raisin Administrative Committee (Pet. App. 129a-130a).

Of course, one need not collectivize half the private property in America to see the flaws of the Ninth

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[4] All these "benefits" with "no federal funding," says the Ninth Circuit (Pet. App. 6a)—as if this scheme were *more* constitutional because it runs on confiscated property rather than taxes.

Circuit's approach. Take *Loretto* itself. This Court found a per se taking because there was "a permanent physical occupation of property." *Loretto*, 458 U.S. at 441. But if the Ninth Circuit were right, the government could easily have manipulated the applicable standard, avoiding the per se rule. All it needed to do was tell the Court that, even if the property owners were too obtuse to realize it, they "benefited" from the government taking their property to install cable by the improvement of the nationwide communications system, the resulting increase in educational and entertainment programming, and ultimately a richer cultural milieu. Thus, the "disposition" of the owners' property "inure[d] to [their] benefit." Pet. App. 22a.

Indeed, such arguments could be made for any taking. For instance, "even the family that gets booted from its home to make room for a freeway will get the benefit of a much faster commute from the park bench whence it must take up residence." *WLF*, 271 F.3d at 866 (Kozinski, J., dissenting). "In a complex world, a property owner will always get *some* benefit, real or theoretical, from a taking of his property." *Ibid.*

In fact, such an argument was made in *Loretto*—and rejected. As the Court explained, even if the taking "serve[d] the legitimate public purpose of 'rapid development of and maximum penetration by a means of communication which has important educational and community aspects,'" that "is a separate question" from whether a taking occurred. *Loretto*, 458 U.S. at 425. "[A] permanent physical occupation authorized by government is a taking without regard to the public interests that it may serve." *Id.* at 426.

If the ruling below is right, then *Loretto* is wrong. Indeed, many of this Court's taking cases must be wrong. "[T]he physical taking of *any* property by the government * * * is a compensable taking, even if the property owner gets an offsetting—or even a net—benefit." *WLF*, 271 F.3d at 866 (Kozinski, J., dissenting). As Justice Holmes put it long ago: "[A] strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change." *Pa. Coal Co.* v. *Mahon*, 260 U.S. 393, 416 (1922).

C. Evisceration of the per se takings rule would undermine property ownership, autonomy, and reliance interests.

1. By making it easy for governments to avoid the per se takings rule, the decision below would undermine the foundational values of American property law. The Fifth Amendment embodies the principle that property rights are central to a free people and a just government. Property cannot be taken without "due process"; and when it is taken, the government must pay "just compensation." U.S. Const. amend. V.

These guarantees reflect the many values inherent in private property. They promote individual achievement, privacy, and autonomy from government intrusion. *Loretto*, 458 U.S. at 436 ("[P]roperty law has long protected an owner's expectation that he will be relatively undisturbed at least in the possession of his property."). They also protect settled expectations and reliance interests. Moreover, they foster equal treatment under the law by barring the government "from forcing some people alone to bear public burdens which, in all fairness and justice,

should be borne by the public as a whole." *Armstrong* v. *United States*, 364 U.S. 40, 49 (1960). But under the Ninth Circuit's decision, most takings would be assessed only under the malleable *Penn Central* standard. Applying that standard writ large would provide scant protection to core property rights.

As this Court has recognized, "[t]he traditional rule" embodied by *Loretto* "avoids otherwise difficult line-drawing problems." *Loretto*, 458 U.S. at 436. Since *Penn Central*, the Court has expressed discontent with that decision's "'essentially ad hoc, factual inquir[y].'" *Koontz* v. *St. Johns River Water Mgmt. Dist.*, 133 S. Ct. 2586, 2600 (2013) (quoting *Penn Central*, 438 U.S. at 124). In *Koontz*, the Court declined to apply, "much less extend that 'already difficult and uncertain rule'" to a monetary exaction. *Ibid.* (quoting *E. Enters.* v. *Apfel*, 524 U.S. 498, 542 (1998) (Kennedy, J., concurring in the judgment and dissenting in part)). Indeed, the question of when a taking occurs under *Penn Central* is "among the most litigated and perplexing in current law." *E. Enters.*, 524 U.S. at 542 (Kennedy, J.).

2. The central weakness in *Penn Central*'s three-factor balancing test is that it is readily susceptible to manipulation. Whether a taking occurs depends on a balancing of: (1) the regulation's "economic impact" on the property owner; (2) "the extent to which the regulation has interfered with distinct investment-backed expectations"; and (3) "the character of the governmental action." 438 U.S. at 124. Those factors are incapable of consistent application—and should not be extended beyond regulatory takings, to actual physical takings.

The first factor examines the economic impact on the property owner. Which way this factor points depends on how the impact is characterized. A court sympathetic to a taking can easily invoke the "bundle of rights" concept and frame the taking as one that removes only a couple twigs from the bundle—as the Ninth Circuit did here. Pet. App. 18a, 20a; see Eric R. Claeys, *The* Penn Central *Test and Tensions in Liberal Property Theory*, 30 Harv. Envtl. L. Rev. 339, 357 (2006). By contrast, courts less sympathetic to the government can "construe[] the owners' interest much more broadly," often by characterizing the right taken as one of the bundle's more significant sticks. *Id.* at 361.

The second factor focuses on "investment-backed expectations." But this phrase obscures more than it illuminates. As Professor Richard Epstein has observed, "we should be deeply suspicious of the phrase 'investment-backed expectations' because it is not possible to identify even the paradigmatic case of its use." Richard A. Epstein, Lucas *v.* South Carolina Coastal Council*:* *A Tangled Web of Expectations*, 45 Stan. L. Rev. 1369, 1370 (1993). If the phrase is supposed "to convey the idea that property is protected only where it has been acquired by purchase or labor, then it is clearly inaccurate": "The government cannot take property from a donee anymore than it can take it from a buyer." *Ibid.* Of course, this factor can swing either way depending on whether the court chooses to frame the property interest in commercial terms.

The third factor, the character of the government action, is likewise unpredictable and easily manipulated. If a court characterizes the government action "by focusing on the invasiveness of the regulation,"

this factor will point toward a taking. Claeys, *supra*, at 357. But if the court "tak[es] at face value the purposes for which the government professed to act" and gives these purposes "close to rational-basis deference," this factor will point the other way. *Ibid.* "Whether one or the other of the competing characterizations will come to one's lips in a particular case depends primarily upon one's evaluation of the worth of competing uses of real estate." *Lucas*, 505 U.S. at 1025.

3. *Penn Central*'s malleability erodes the values served by the protection of private property, creating uncertainty at the public's expense. Citizens "will not be able to make informed choices" about their property if the Court does not apply "clear standards to determine when compensation will be paid." Susan Rose-Ackerman, *Against Ad Hocery: A Comment on Michelman*, 88 Colum. L. Rev. 1697, 1700 (1988). Because the Takings Clause "is an attempt to reconcile an unpredictable, democratically responsible polity with the existence of a capitalist economy based on private property and individual initiative," ad hoc takings rules "introduce[] an element of uncertainty into private investment decisions that could make the coexistence of democracy and private property more, rather than less, difficult." *Id.* at 1701-1702.

Further, unpredictable standards tend to destroy "the appearance of equal treatment." Antonin Scalia, *The Rule of Law As A Law of Rules*, 56 U. Chi. L. Rev. 1175, 1178 (1989). Because *Penn Central*, "with its lack of objective criteria, does not impart knowledge of the legal rights and obligations of either property owners or public officials," its application has "result[ed] in protracted litigation and arbitrary outcomes." Steven J. Eagle, *The Four-Factor* Penn

Central *Regulatory Takings Test*, 118 Penn St. L. Rev. 601, 605 (2014).

The per se framework produces fairer and more predictable results than *Penn Central*, and it should be generally favored by the law. Yet, under the decision below, the per se rule would rarely apply. Whenever the government offered some contingent interest in the taken property—even if that interest was worthless or had value only in the government's eyes—there would never be a per se taking. Instead, *Penn Central* would apply, permitting property rights of all sorts to be "balanced" away. To preserve the core protection of the Takings Clause, the Ninth Circuit's decision must be reviewed and reversed.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted.

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OCTOBER 2014

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APPENDIX

APPENDIX A: LIST OF *AMICI CURIAE*

The *Cato Institute* was established in 1977 as a nonpartisan public-policy research foundation dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Center for Constitutional Studies was established in 1989 to help restore the principles of limited constitutional government that are the foundation of liberty. Toward those ends, Cato publishes books and studies, conducts conferences, publishes the annual *Cato Supreme Court Review*, and files *amicus* briefs, including in various cases concerning property rights. This case is of central concern to Cato because it implicates the safeguards the Constitution provides for the protection of property rights against wrongful takings.

The *National Federation of Independent Business* (NFIB) is the nation's leading small business association, representing members in Washington, D.C., and all 50 state capitals. Founded in 1943 as a nonprofit, nonpartisan organization, NFIB's mission is to promote and protect the right of its members to own, operate, and grow their businesses. NFIB represents about 350,000 member businesses nationwide, and its membership spans the spectrum of business operations, ranging from sole proprietor enterprises to firms with hundreds of employees. While there is no standard definition of a "small business," the typical NFIB member employs 10 people and reports gross sales of about $500,000 a year. The NFIB membership is a reflection of American small business.

The *National Federation of Independent Business Small Business Legal Center* (NFIB Legal Center) is a nonprofit, public interest law firm established to

provide legal resources and be the voice for small businesses in the nation's courts on issues of public interest affecting small businesses. To fulfill its role as the voice for small business, the NFIB Legal Center frequently files *amicus* briefs in cases that will impact small businesses.

The *Center for Constitutional Jurisprudence* is the public interest law arm of the Claremont Institute, the mission of which is to restore the principles of the American Founding to their rightful and preeminent authority in our national life, including the proposition expressed in the Fifth Amendment that private property can be taken only for public use, and then only upon payment of just compensation. In addition to providing counsel for parties at all levels of state and federal courts, the Center has participated as *amicus curiae* before this Court in several cases of constitutional significance, including *Kelo* v. *City of New London, Connecticut*, 545 U.S. 469 (2005), and *Rapanos* v. *United States*, 547 U.S. 715 (2006).

The *Institute for Justice* is a nonprofit, public interest law center committed to defending the essential foundations of a free society through securing greater protection for individual liberty and restoring constitutional limits on the power of government. Central to the mission of the Institute is strengthening the ability of individuals to control and transfer property and demonstrating that property rights are inextricably connected to other civil rights.

The *Reason Foundation* is a national, nonpartisan, and nonprofit public policy think tank, founded in 1978. Reason's mission is to advance a free society by developing, applying, and promoting libertarian principles and policies—including free markets, indi-

vidual liberty, and the rule of law. Reason supports dynamic market-based public policies that allow and encourage individuals and voluntary institutions to flourish. Reason advances its mission by publishing *Reason* magazine, as well as commentary on its websites, *www.reason.com* and *www.reason.tv*, and by issuing policy research reports. To further Reason's commitment to "Free Minds and Free Markets," Reason selectively participates as *amicus curiae* in cases raising significant constitutional issues.

Southeastern Legal Foundation (SLF), founded in 1976, is a national non-profit, public interest law firm and policy center that promotes the public interest in the proper construction and enforcement of the laws and Constitution of the United States in the courts of law and through public discourse. SLF advocates constitutional individual liberties, private property rights, limited government, and the free enterprise system in its litigation cases and *amicus* participation in state and federal courts.